FILED
DEC 20 1999
CLERK

(2)

No. 99-851

IN THE

Supreme Court of the United States

STEPHEN P. SUGARBAKER,

Petitioner,

v.

SSM HEALTHCARE, d/b/a ST. MARYS HEALTH CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DAVID M. HARRIS
Counsel of Record
JOHN E. PETITE
DAWN M. JOHNSON
GREENSFELDER, HEMKER
& GALE, P.C.
Attorneys for Respondent
2000 Equitable Building
10 South Broadway
St. Louis, MO 63102-1774
(314) 241-9090

156833

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

29pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in affirming summary judgment against Petitioner under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 ("HCQIA"), by fashioning in harmony with its sister circuits a summary judgment standard tailored to the substantive evidentiary standards that apply to HCQIA cases.

II. Whether the Court of Appeals erred in affirming summary judgment against Petitioner on HCQIA immunity grounds by concluding in harmony with its sister circuits that expert testimony as to the propriety of medical care provided by the adversely affected practitioner cannot rebut the HCQIA presumption that a peer review action was taken in the reasonable belief that it was in furtherance of quality health care or in the reasonable belief that the action was warranted by the facts known.

STATEMENT PURSUANT TO RULE 29.6

SSM Healthcare is a Missouri not-for-profit corporation whose sole corporate member is the Franciscan Sisters of Mary, a religious order of the Roman Catholic Church. There is no parent company, and no publicly held company owns 10% or more of its stock inasmuch as SSM Healthcare is a not-for-profit organization.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	vi
Citations of the Official Reports of Opinions	1
Statement of the Case	1
A. The Undisputed Facts.	1
B. The District Court Action.	3
C. The Decision of the United States Court of Appeals for the Eighth Circuit.	4
Reasons for Denying the Writ	5
I. The Court Of Appeals Correctly Affirmed Summary Judgment Against Petitioner Under The HCQIA By Fashioning In Harmony With Its Sister Circuits A Summary Judgment Standard Tailored To The Substantive Evidentiary Standards That Apply To HCQIA Cases.	6

Contents

Page

A. Dr. Sugarbaker Waived Any Argument Concerning the Proper Standard of Review for Summary Judgment Under the HCQIA by Failing to Make That Argument in the Courts Below and Failing to Identify Here Any Exceptional Circumstances That Warrant Review by This Court. 6

B. The Court of Appeals Properly Affirmed Summary Judgment Against Dr. Sugarbaker By Applying the Summary Judgment Standard That Has Been Applied by All Courts of Appeals That Have Faced the HCQIA Immunity Issue. 9

II. The Court Of Appeals Correctly Affirmed Summary Judgment Against Petitioner On HCQIA Immunity Grounds By Concluding In Harmony With Its Sister Circuits That Expert Testimony As To The Propriety Of Medical Care Provided By The Adversely Affected Practitioner Cannot Rebut The HCQIA Presumption That A Peer Review Action Was Taken In The Reasonable Belief That It Was In Furtherance Of Quality Health Care Or In The Reasonable Belief That The Action Was Warranted By The Facts Known. 14

Contents

Page

A. There is No Conflict Between or Among the Courts of Appeals, As Required to Grant Dr. Sugarbaker's Petition. 15

B. There is No Conflict Between the Decision Below and Those of This Court, As Required to Grant Dr. Sugarbaker's Petition. 18

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 4, 10, 11, 12

Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) 11, 12

Brader v. Allegheny Gen. Hosp., 64 F.3d 869 (3d Cir. 1995), *appeal after remand*, 167 F.3d 832 (3d Cir. 1999) 4, 11, 13

Brown v. Presbyterian Healthcare Services, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997) 9, 14, 15, 16, 17

Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318 (11th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995) 9, 11, 13

Celotex Corporation v. Catrett, 477 U.S. 317 (1986) 10

Duignan v. United States, 274 U.S. 195 (1927) ... 7, 8

Gila Valley, Globe & Northern Ry. Co. v. Hall, 232 U.S. 94 (1914) 8

Graver Tank Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 13

Cited Authorities

	Page
Gregory v. Missouri Pacific Ry. Co., 32 F.3d 160 (5th Cir. 1994)	7
Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961 (1999)	7, 18
Hossaini v. Western Missouri Med. Ctr., 140 F.3d 1140 (8th Cir. 1998)	7
Magruder v. Drury, 235 U.S. 106 (1914)	8
Mathews v. Lancaster Gen. Hosp., 87 F.3d 624 (3d Cir. 1996)	9
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	10
Parker v. Brown, 317 U.S. 341 (1943)	18, 19
Patrick v. Burget, 486 U.S. 94 (1988)	14, 18, 19
Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952 (1998)	7, 18
Smith v. Ricks, 31 F.3d 1478 (9th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995)	9
Steagald v. United States, 451 U.S. 204 (1981)	7
United States v. Johnston, 268 U.S. 220 (1925)	13

Cited Authorities

Page

United States v. Lorenzetti, 467 U.S. 167 (1984) .. 14

United States v. Mendoza, 464 U.S. 154 (1984) ... 18

Youakim v. Miller, 425 U.S. 231 (1976) 8

Statutes:

42 U.S.C. §§ 11101-11152 ..... i, 2

42 U.S.C. § 11112(a) 11, 12, 16

42 U.S.C. § 11112(a)(1) 16

42 U.S.C. § 11112(a)(4) 16

42 U.S.C. § 11113 3

Rules:

Fed. R. Civ. P. 56(c) 4, 10

United States Supreme Court Rule 10 .. 5, 13, 14, 17, 19

United States Supreme Court Rule 10(a) 9

United States Supreme Court Rule 14.4 1

CITATIONS OF THE OFFICIAL REPORTS OF OPINIONS

The decision of the United States Court of Appeals for the Eighth Circuit ("Court of Appeals") is reported at *Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999), and is set forth in the Petitioner's Appendix at 1a-27a. The Order of the United States District Court for the Western District of Missouri ("District Court"), dated June 10, 1998, is unreported and is set forth in the Petitioner's Appendix at 28a-34a. Respondent SSM Healthcare, d/b/a St. Marys Health Center ("St. Marys") notes for the Court, however, that the District Court and Eighth Circuit opinions, as reprinted in the Petitioner's Appendix, contain numerous typographical and other errors that impair this Court's ability to readily and adequately understand and consider the opinions below. For this reason alone, the Petition should be denied. *See* Sup. Ct. R. 14.4.

STATEMENT OF THE CASE

A. The Undisputed Facts.

Shortly after securing staff membership and clinical privileges at St. Marys pursuant to a less than forthright medical staff application that failed to disclose his prior failings at other institutions, Petitioner Stephen P. Sugarbaker, M.D. ("Dr. Sugarbaker" or "Petitioner") became the subject of staff complaints about his clinical practice and surgical skills. Once alerted to these concerns, St. Marys undertook an exhaustive and painstaking peer review of Dr. Sugarbaker's practice at the hospital. Although St. Marys is tempted by Dr. Sugarbaker's gross distortions of the record to belabor the Court with a detailed recitation of each step of the peer review process, St. Marys instead refers the Court

to the Eighth Circuit's accurate and concise statement of the facts, which St. Marys hereby adopts and incorporates by reference herein. *See Sugarbaker v. SSM Health Care*, 190 F.3d 905, 908-11 (8th Cir. 1999).

Suffice it to say, that at each stage of this process, St. Marys provided Dr. Sugarbaker with the full panoply of procedural protections, giving him notice and an opportunity to be heard before ultimately restricting his privileges. These restrictions were entirely consistent with and carefully tailored to the health care concerns identified during the peer review process. Specifically, the restrictions would have allowed Dr. Sugarbaker to exercise the vast majority of his clinical privileges and continue practicing at St. Marys, but prevented him from exercising his clinical privileges to perform laparoscopic gall bladder surgery and emergency/trauma surgery until he obtained further training and demonstrated current competence in those areas.

Rather than comply with these conditions, Dr. Sugarbaker sued St. Marys in state court seeking to enjoin it from discharging its obligations under state and federal law to report the restrictions to Missouri's Board of Registration for the Healing Arts and, in turn, the National Practitioner Data Bank. When that attempt failed, Dr. Sugarbaker again challenged St. Marys' peer review action, this time suing St. Marys in federal court for damages and a never-pursued claim for injunctive relief, asserting a Sherman Act claim and five (5) pendent state law claims. Because each of his claims sought to impose liability on St. Marys for its peer review action of restricting his clinical privileges, Dr. Sugarbaker's claims implicated the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 ("HCQIA"), which, among other things, precludes hospitals from being held liable in damages for objectively reasonable peer review actions.

B. The District Court Action.

Accordingly, in both his original and amended complaints, Dr. Sugarbaker alleged as he must that St. Marys' peer review action was not entitled to HCQIA immunity. (R. 21, 1090-91.) St. Marys first moved to dismiss Dr. Sugarbaker's antitrust and state law claims for failure to state a claim. When that proved unsuccessful, St. Marys moved for summary judgment under the HCQIA. The District Court denied this motion as premature and ruled that it could not be re-filed until discovery was completed.

After the close of discovery, St. Marys filed two separate motions for summary judgment. The first reasserted that Dr. Sugarbaker could not sustain his burden of proving that St. Marys' peer review action did not enjoy HCQIA immunity. The second motion asserted that each of his claims failed on the merits. The District Court sustained the first of these motions and denied the second as moot.

In granting summary judgment in favor of St. Marys on Dr. Sugarbaker's claims, the District Court found that St. Marys' "decision to restrict [Dr. Sugarbaker's] hospital privileges is clearly protected by the HCQIA." (App. 31a.) More specifically, because no reasonable jury could conclude on the undisputed facts that Dr. Sugarbaker had rebutted the presumption that St. Marys' peer review action was objectively reasonable, the District Court held that the HCQIA immunized St. Marys from Dr. Sugarbaker's claims. As a result of this decision, St. Marys asked for an award of fees pursuant to 42 U.S.C. § 11113, the HCQIA's fee-shifting provision. The District Court denied St. Marys' motion for fees.

C. The Decision of the United States Court of Appeals for the Eighth Circuit.

Dr. Sugarbaker appealed the District Court's immunity decision in favor of St. Marys, and St. Marys appealed the District Court's denial of St. Marys' motions to dismiss and motion for attorney fees, to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the District Court's order granting summary judgment in favor of St. Marys did not reach the merits of St. Marys' cross-appeal and affirmed the District Court's order denying St. Marys' motion for fees. *Sugarbaker*, 190 F.3d at 918-19 (affirming immunity decision); *Sugarbaker v. SSM Health Care*, 187 F.3d 853 (8th Cir. 1999) (affirming attorney fees decision).

In affirming the HCQIA immunity decision, the Court of Appeals first articulated the appropriate summary judgment standard for the immunity issue. 190 F.3d at 912. It began by noting that this Court's Rule 56(c) decisions require that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.* (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). From the HCQIA's evidentiary standard, under which "St. Marys is presumed to have complied with the [HCQIA immunity] standards" and "Dr. Sugarbaker bears the burden of rebutting that presumption," *id.*, the Court of Appeals fashioned the following summary judgment standard: "whether Dr. Sugarbaker satisfied his burden of producing evidence that would allow a reasonable jury to conclude that St. Marys' peer review disciplinary process failed to meet the standards of HCQIA." *Id.* (*quoting Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 839 (3d Cir. 1994)).

The Eighth Circuit affirmed the District Court's decision that Dr. Sugarbaker had not carried that burden, rejecting many of his arguments on appeal as "largely disjointed, conclusory, and sometimes confusing." 190 F.3d at 915. Dr. Sugarbaker now petitions this Court to review that decision. As demonstrated below, however, Dr. Sugarbaker's Petition for Writ of Certiorari (the "Petition") is without merit and should be rejected.

REASONS FOR DENYING THE WRIT

This case does not present issues that warrant review by this Court for two independent reasons. First, Dr. Sugarbaker did not press below any of the issues he now advances and thus failed to preserve them. Second, the Court of Appeals did not resolve the issues identified by Dr. Sugarbaker in direct conflict with the holdings of other courts of appeals or those of this Court. Dr. Sugarbaker's fact-bound claim that the courts below applied improper evidentiary standards likewise does not warrant review by this Court. In the end, the decision below was a plainly correct application of settled law, leaving Dr. Sugarbaker no choice but to attempt to create a split among the circuits where none exists. This Court should deny the Petition because it contains no issues captured by any of the categories set forth in United States Supreme Court Rule 10.

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED SUMMARY JUDGMENT AGAINST PETITIONER UNDER THE HCQIA BY FASHIONING IN HARMONY WITH ITS SISTER CIRCUITS A SUMMARY JUDGMENT STANDARD TAILORED TO THE SUBSTANTIVE EVIDENTIARY STANDARDS THAT APPLY TO HCQIA CASES.

A. Dr. Sugarbaker Waived Any Argument Concerning the Proper Standard of Review for Summary Judgment Under the HCQIA by Failing to Make That Argument in the Courts Below and Failing to Identify Here Any Exceptional Circumstances That Warrant Review by This Court.

This Court should deny the Petition because Dr. Sugarbaker waived any attempt to attack the proper standard of review for summary judgment under the HCQIA. Dr. Sugarbaker failed to raise this issue in the District Court or in the Eighth Circuit Court of Appeals. In fact, rather than attacking the standard for summary judgment under the HCQIA, he actually recited it as the *proper* standard for review and even relied on the first case that adopted the standard. *See* Brief of Appellant, filed August 21, 1998, at 33 ("[T]he test is, if 'a reasonable jury, viewing the facts in the best light for [Dr. Sugarbaker], [could] conclude that he has shown, by a preponderance of the evidence, that [St. Marys'] actions are outside the scope of [HCQIA immunity],' summary judgment would be inappropriate. *See Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992).");

Reply Brief of Appellant, filed January 21, 1999, at 5 (" '[The] question is whether [a] reasonable jury, **viewing [the] facts in plaintiff's favor**, could conclude he had shown by preponderance of evidence that the defendants' actions fall outside of § 11112(a).' *Wayne v. Genesis Medical Ctr.*, 140 F.3d 1145, 1149 (8th Cir. 1998) (emphasis added)."); Plaintiff's Suggestions in Opposition to St. Marys' Motion for Summary Judgment Under the Health Care Quality Improvement Act of 1986, filed May 29, 1998, at 25 (same).

Dr. Sugarbaker is estopped from attacking the very standard that he embraced in the District Court and the Court of Appeals. *See Steagald v. United States*, 451 U.S. 204, 208-211 (1981) (finding that government, by making contrary assertions in the courts below, had waived its right to raise such issues in this Court); *Hossaini v. Western Missouri Med. Ctr.*, 140 F.3d 1140, 1142-43 (8th Cir. 1998) (noting that the doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same litigation); *Gregory v. Missouri Pacific Ry. Co.*, 32 F.3d 160, 164-65 (5th Cir. 1994) (holding that a party cannot take one position before the district court and then take an inconsistent position on appeal). For this reason alone, Dr. Sugarbaker's Petition should be denied.

Furthermore, this Court has held repeatedly that absent exceptional circumstances it will not consider issues raised for the first time in this Court. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961, 1968 n.3 (1999) (refusing to consider issue that was neither raised nor considered below); *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (refusing to consider issue that was neither raised before nor addressed by either the district court or the court of appeals); *Duignan v. United*

States, 274 U.S. 195, 200 (1927) (same). Here, Dr. Sugarbaker has failed not only to acknowledge in this Court that he did not raise this issue below, but also to point to any exceptional circumstance that would allow this Court to consider this issue. Dr. Sugarbaker simply did not preserve this issue for the Court's review.

There is nothing exceptional about this case that would warrant consideration of an issue that was never raised below and on which this Court would not have the benefit of consideration by the lower courts. Only errors that are of a "fundamental or jurisdictional character" could possibly warrant review under these circumstances. *See Magruder v. Drury*, 235 U.S. 106, 113 (1914). The standard of review for summary judgment under the HCQIA cannot be considered either fundamental or jurisdictional. *See Gila Valley, Globe & Northern Ry. Co. v. Hall*, 232 U.S. 94, 98-99 (1914) (refusing to hear matters not jurisdictional nor essential to the foundation of the action, but involving a mere matter of procedure, that were not raised in the courts below). *Cf. Youakim v. Miller*, 425 U.S. 231 (1976) (addressing issue not raised below in order to resolve conflict between state and federal statutes concerning claim that the Illinois foster care program is in conflict with the Social Security Act). The Petition should therefore be denied.

B. The Court of Appeals Properly Affirmed Summary Judgment Against Dr. Sugarbaker By Applying the Summary Judgment Standard That Has Been Applied by All Courts of Appeals That Have Faced the HCQIA Immunity Issue.

Perhaps recognizing that no reviewable conflict exists in this case, Dr. Sugarbaker resorts to misconstruing the record and the relevant case law in an effort to manufacture one. Contrary to Dr. Sugarbaker's erroneous assertions, however, every court of appeals that has considered summary judgment under the HCQIA has applied the same standard of review and none of their opinions reflect any disagreement on that score. *See, e.g., Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 633 (3d Cir. 1996); *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1333 (11th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995); *Smith v. Ricks*, 31 F.3d 1478, 1485 (9th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995).

Undettered by this unanimous precedent, Dr. Sugarbaker nonetheless argues that the Tenth Circuit has refused to apply the standard of review adopted by the other circuits. (Petitioner's Brief ("Br.") at 7.) This argument is patently incorrect. The Tenth Circuit, in *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997), actually adopted the same standard that all the other circuits have applied. *Id.* at 1334 n.9 ("[T]he proper inquiry for the court is whether Dr. Brown has provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under 42 U.S.C. § 11112(a)."). Thus, the courts of appeals have unanimously and properly adopted the standard applied by the Eighth Circuit below and, therefore, there is no reason for review by this Court. *See* Sup. Ct. R. 10(a).

Even if this Court were to somehow excuse Dr. Sugarbaker's waiver of the issue and overlook the unanimity of the courts of appeals, the issue is still not reviewable. Contrary to Dr. Sugarbaker's argument, there has been no "misapplication" by the lower courts of the burden of proof for summary judgment. (Br. at 7.) Rather, the courts have merely followed and applied this Court's directive that a court upon a motion for summary judgment must view the evidence presented through the "prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). As a result, this Court should deny the Petition because Dr. Sugarbaker has manufactured an argument that borders on frivolous by confusing the issue of the propriety of a rebuttable presumption with the standards concerning the burden of proof for summary judgment.

It is well-settled that the party moving for summary judgment has the burden of demonstrating that the Rule 56(c) test — "no genuine issue as to any material fact" — is satisfied and that the movant is entitled to judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-25 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); Fed. R. Civ. P. 56(c). Because the burden is on the movant, the evidence presented to the court is always construed in favor of the party opposing the motion and the non-moving party is given the benefit of all favorable inferences that can be drawn from it. *Matsushita*, 475 U.S. at 487. A moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a showing on an essential element of his case with respect to which he has the burden of proof. *Celotex*, 477 U.S. at 322-23. In ruling upon a motion for summary

judgment, however, the court must view the evidence presented through "the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254.

The prism of the substantive law applicable to this case is the presumption that a professional review action meets the standards of immunity, "unless the presumption is rebutted by a preponderance of the evidence." 42 U.S.C. § 11112(a). Tailoring the summary judgment standard to the substantive law of HCQIA immunity, the courts of appeals have articulated the standard as follows: "Might a reasonable jury, viewing the facts in the best light for [plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?" *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992). *See also Bryan*, 33 F.3d at 1333 ("In a sense, the presumption language in HCQIA means that the *plaintiff* bears the burden of proving that the peer review process was *not* reasonable."); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 879-80 (3d Cir. 1995) (holding that the HCQIA's rebuttable presumption "necessarily implies that plaintiffs bear the burden of proving noncompliance with the [HCQIA's] standards" and, as such, requires physician plaintiffs to plead and prove the absence of HCQIA immunity as an essential element of their claim), *appeal after remand*, 167 F.3d 832 (3d Cir. 1999).

The *Austin* court and every other court of appeals that has since followed its summary judgment standard of review in HCQIA cases merely complied with this Court's mandate to account for the substantive evidentiary burden that will be applicable at trial. As this Court has stated:

> It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Anderson, 477 U.S. at 254-55. That is precisely what all of the courts of appeals have done in the context of the HCQIA. The so-called "unconventional twist" to the summary judgment analysis applied by the Eighth Circuit likewise comports with this Court's mandate that " 'the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.' " *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 913 (8th Cir. 1999) (*quoting Anderson v. Liberty Lobby*, 477 U.S. at 255). Therefore, there has been no improper "judicial realignment" of the burden of proof as Dr. Sugarbaker erroneously suggests. (Br. at 11.)

Dr. Sugarbaker also argues that HCQIA immunity is an affirmative defense on which St. Marys bears the burden of proof. (Br. at 10-11.) Dr. Sugarbaker is wrong. Indeed, the very language of the statute imposes on the plantiff the burden of proving that the defendant hospital does not meet the requirements of the statute. § 11112(a). It is for this reason

that the Third Circuit has held that the absence of HCQIA immunity is an essential element of the plaintiff's claim. *Brader*, 64 F.3d at 879-80. *See also Bryan*, 33 F.3d at 1333. The HCQIA summary judgment standard fashioned by the courts of appeals thus does nothing more than require a plaintiff such as Dr. Sugarbaker to carry his burden of proof on an essential element of his claim. Dr. Sugarbaker's argument should therefore be rejected.

Even assuming *arguendo* that the courts of appeals have misapplied the summary judgment standard or that the Eighth Circuit resolved conflicts in evidence in the light most favorable to St. Marys, as Dr. Sugarbaker argues, review by this Court still is not warranted. Misapplication of a properly stated rule of law is "rarely" a reason for this Court to grant a petition. Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts."); *Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.") (and cases cited therein). For these reasons, the Petition should be denied.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED SUMMARY JUDGMENT AGAINST PETITIONER ON HCQIA IMMUNITY GROUNDS BY CONCLUDING IN HARMONY WITH ITS SISTER CIRCUITS THAT EXPERT TESTIMONY AS TO THE PROPRIETY OF MEDICAL CARE PROVIDED BY THE ADVERSELY AFFECTED PRACTITIONER CANNOT REBUT THE HCQIA PRESUMPTION THAT A PEER REVIEW ACTION WAS TAKEN IN THE REASONABLE BELIEF THAT IT WAS IN FURTHERANCE OF QUALITY HEALTH CARE OR IN THE REASONABLE BELIEF THAT THE ACTION WAS WARRANTED BY THE FACTS KNOWN.

There is no conflict among the federal courts of appeals, or between the decision below and those of this Court, to justify granting the instant Petition. *See* Sup. Ct. R. 10; *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (grant of certiorari warranted where courts of appeals decisions "squarely conflicted."). Dr. Sugarbaker mistakenly asserts that the Eighth Circuit decision below squarely conflicts with the Tenth Circuit's decision in *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997). Similarly, Dr. Sugarbaker mischaracterizes both this Court's decision in *Patrick v. Burget*, 486 U.S. 94 (1988), and the HCQIA's legislative history in a misguided attempt to conjure a conflict between the decisions below and this Court's jurisprudence. As demonstrated below, both of these attempts to create a conflict are unavailing and cannot justify the issuance of a writ.

A. There is No Conflict Between or Among the Courts of Appeals, As Required to Grant Dr. Sugarbaker's Petition.

The decision of the Court of Appeals does not conflict with any decision of its sister circuits. Dr. Sugarbaker argues that the Tenth Circuit held in *Brown* that "medical expert witness testimony submitted by a plaintiff is sufficient evidence to overcome the statutory presumption under HCQIA and to raise a genuine issue of material fact." (Br. at 12.) Dr. Sugarbaker, however, has improperly oversimplified the *Brown* decision, glossing over its precise holding in an effort to manufacture a conflict where none exists. Indeed, upon a more careful analysis, the *Sugarbaker* and *Brown* decisions do not conflict at all.

The Eighth Circuit had no reason to and did not expressly disagree with the Tenth Circuit's holding in *Brown*. The HCQIA immunity decision in *Brown* turned on the second prong of the immunity analysis; *i.e.*, whether the defendant hospital conducted a reasonable factual investigation. There, the defendant hospital based its decision to terminate the medical staff privileges of the plaintiff, Dr. Brown, on a review of just two (2) patient charts. *Brown*, 101 F.3d at 1328. The Tenth Circuit affirmed the district court's denial of the defendant's motion for judgment as a matter of law. The court held that HCQIA immunity was not available as a matter of law because the evidence could support a verdict that the defendant hospital had not engaged in a reasonable effort to obtain the facts of the matter. *Id.* at 1333-34. In reaching this decision, the court relied in part on expert testimony that the hospital's two-chart review was "unreasonably restrictive." *Id.*

In this case, by contrast, Dr. Sugarbaker did not present any expert testimony whatsoever with respect to the

reasonable investigation prong of the HCQIA analysis. None of his experts opine that St. Marys' exhaustive review of twenty-five (25) cases did not constitute a reasonable factual investigation. No expert opines that the countless hours St. Marys spent investigating this matter, including a six (6)-hour particularized review of six (6) of Dr. Sugarbaker's surgical cases and a lengthy appellate review of those cases, were unreasonably truncated. There simply is no expert testimony as to the reasonableness of St. Marys' investigation similar to that proffered in *Brown* such that the decisions below squarely conflict with that of the *Brown* court.

Instead, all of Dr. Sugarbaker's experts opine on the propriety of medical care delivered by Dr. Sugarbaker (R. 2586-89, 2606-11, 2616-21, 2623-24), an issue wholly distinct from the issue of whether St. Marys' factual investigation was reasonable. Dr. Sugarbaker proffered that testimony in support of his argument that St. Marys did not have a reasonable belief that its peer review action was in furtherance of quality health care or was warranted by the facts known. *See* §§ 11112(a)(1) and (4). No court of appeals has specifically held that such expert testimony is sufficient to rebut the presumption that a peer review action satisfies those two prongs of the HCQIA analysis. There is thus no conflict between or among the courts of appeals for this Court to review and resolve.

With respect to the reasonable investigation prong of the HCQIA analysis, the Eighth Circuit below carefully reviewed both the factual record regarding the investigation and Dr. Sugarbaker's arguments "that certain alleged deficiencies undermine the reasonableness of the fact gathering process in this case" and found "no merit in any

of his contentions." 190 F.3d at 915. Unlike the Tenth Circuit in *Brown*, the Court of Appeals here did not rely on any expert testimony in making this decision, precisely because the record did not contain any. Rather, after reviewing the facts and circumstances of St. Marys' factual investigation, the Court of Appeals endorsed the "view expressed by the District Court: 'if St. Marys did nothing else, it undertook a thorough investigation of the facts.' " *Id. Brown* is thus both factually and analytically distinguishable and does not conflict with the decision below.

Even if the distinctions between the decisions below and *Brown* are somehow discounted, review by this Court is still unwarranted because Dr. Sugarbaker has at most identified a "misapplication of a properly stated rule of law," an error which only "rarely" results in a petition for writ of certiorari being granted. *See* Sup. Ct. R. 10. Both the Eighth Circuit in *Sugarbaker* and the Tenth Circuit in *Brown* properly stated the applicable rule of law; *i.e.*, the four-pronged HCQIA immunity analysis under which the plaintiff must rebut the presumption of immunity by a preponderance of evidence. *See Sugarbaker*, 190 F.3d at 912; *Brown*, 101 F.3d at 1333. Therefore, even assuming *arguendo* that the decisions squarely conflict, which they do not, they conflict only as to the courts of appeals' differing applications of this well-established HCQIA legal principle. Whether real or imagined, this conflict simply is not an "important federal question" that presents a "compelling reason" to grant Dr. Sugarbaker's Petition. *See* Sup. Ct. R. 10.

Review is unwarranted for the additional reason that any tension between the decisions arises in the context of a

developing area of the law that has yet to "percolate" in the circuit courts of appeals. In *United States v. Mendoza*, 464 U.S. 154 (1984), this Court reaffirmed its longstanding principle that several appellate courts should explore a particular issue before certiorari is granted. *Id.* at 160. Here, only four courts of appeals have even arguably addressed the question that Dr. Sugarbaker asks this Court to review. The First, Second, Fifth, Sixth, Seventh, Ninth and D.C. Circuits have yet to weigh in on this issue. Dr. Sugarbaker's petition thus founders upon the *Mendoza* rule and should be denied.

B. There is No Conflict Between the Decision Below and Those of This Court, As Required to Grant Dr. Sugarbaker's Petition.

Nor is there a direct or apparent conflict between the decisions below and those of this Court as Dr. Sugarbaker would have the Court believe. Dr. Sugarbaker argues that the Eighth Circuit's decision below, and those of its sister circuits, conflict with this Court's decision in *Patrick v. Burget*, 486 U.S. 94 (1988). This argument is wholly illusory for two reasons. First, Dr. Sugarbaker waived it by failing to raise it below. Not once did Dr. Sugarbaker argue that *Patrick* had any bearing on, much less controlled, the issues before the District Court and the Court of Appeals. By thus failing to preserve this issue, Dr. Sugarbaker cannot now press it for the very first time in this Court. *See Grupo Mexicano*, 119 S. Ct. at 1968 n.3; *Yeskey*, 118 S. Ct. at 1956.

Second, *Patrick* has absolutely nothing to do with any of the issues for which Dr. Sugarbaker is seeking review. In *Patrick*, this Court held that *Parker v. Brown*, 317 U.S.

341 (1943), state action immunity from antitrust liability was, on the record therein, not available to a hospital for its peer review actions. 486 U.S. at 105. To be sure, the Court made a passing reference to the HCQIA as a recently enacted statute in which Congress declined to categorically exempt peer review from the reach of the antitrust laws, but which had no retroactive effect in that case. *Id.* at n.8. Not a single syllable in *Patrick*, however, speaks to the HCQIA immunity analysis, the evidentiary standards created by the statute or the type or quantum of evidence necessary to satisfy those standards. *Patrick* is, quite simply, irrelevant herein.

Dr. Sugarbaker contends that "[i]n adopting HCQIA, Congress made clear [in the HCQIA's legislative history that] the physician's claim reviewed by this Court in [*Patrick*] was not the type of claim HCQIA intended to prevent." (Br. at 14-15.) Dr. Sugarbaker is wrong. Indeed, Congress never mentioned *Patrick* anywhere in the HCQIA's legislative history. This is not surprising given that *Patrick* was decided two years after the HCQIA was enacted. There is absolutely no indication in any of that history that Congress believed that HCQIA immunity would not be available on the facts at issue in *Patrick*. Dr. Sugarbaker's argument to the contrary must therefore be rejected.

At bottom, then, Dr. Sugarbaker argues that the facts of this HCQIA immunity case are analogous to those of a decision by this Court interpreting *Parker v. Brown* state action immunity. The incongruity of this purported factual analogy is readily apparent. Even if it were somehow apt, the analogy suggests only a misapplication of settled HCQIA immunity principles, a putative error that cannot justify review by this Court. *See* Sup. Ct. R. 10. Dr. Sugarbaker has not demonstrated any conflict whatsoever between the HCQIA jurisprudence and any decision of this Court or any other basis for granting his Petition.

CONCLUSION

For the foregoing reasons, authorities and equities, the Petition should be denied because the issues raised by Dr. Sugarbaker do not merit further review by this Court. The Petition presents no important question of federal law nor any conflicts among or between the circuit courts of appeals. For the foregoing reasons, St. Marys respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DAVID M. HARRIS
Counsel of Record
JOHN E. PETITE
DAWN M. JOHNSON
GREENSFELDER, HEMKER
& GALE, P.C.
Attorneys for Respondent
2000 Equitable Building
10 South Broadway
St. Louis, MO 63102-1774
(314) 241-9090